

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARLOS DWIGHT POSEY,)
)
 Plaintiff)
)
 vs.)
)
 CHARLES NEWFIELD, et al.,)
)
 Defendants)

Case No. 2:08-cv-00401-UWC-HGD

MEMORANDUM OF OPINION

The magistrate judge filed a Report and Recommendation on October 30, 2008, recommending that this action filed pursuant to 42 U.S.C. § 1983 be dismissed for failing to state a claim upon which relief can be granted under 28 U.S.C. § 1915A(b). Specifically, the magistrate judge found that the plaintiff failed to allege in his complaint a specific incident of excessive force by defendant Newfield.¹ The magistrate judge also found that, to the extent the plaintiff seeks reinstatement of his parole, he must file a petition for writ of habeas corpus. The plaintiff filed objections to the Report and Recommendation on November 6 and 7, 2008. (Docs. #22 & #23).

¹ On June 12, 2008, the plaintiff was informed that he failed to set forth his claims adequately. (Doc. #11). He was ordered to amend his complaint to state clearly how each defendant violated his constitutional rights, the date(s) on which the incident(s) occurred, and where the incident(s) occurred. The plaintiff filed an amended complaint on July 3, 2008 (Doc. #14); however, the plaintiff only repeated his original complaint.

The plaintiff does not object to the magistrate judge's finding that the plaintiff must seek habeas relief if he wishes to challenge his parole revocation. Thus, the plaintiff's request for reinstatement of his parole is due to be dismissed with prejudice in accordance with the magistrate judge's Report and Recommendation.

The plaintiff does, however, object to the dismissal of his excessive force claim against defendant Newfield. The plaintiff states that he is not a lawyer and did not understand the need to fully explain the incident that occurred. (Doc. #22). He claims that on January 10, 2008, at 3805 12th Court South in Birmingham, Alabama, at approximately 2:20 a.m., defendant Newfield, a Birmingham police officer, "violated the Plaintiff[s] constitutional rights by continuously hitting the Plaintiff in the head with his baton seven or more times while the Plaintiff was [lying] face down on the ground." (Docs. #22 & #23). The plaintiff alleges he was taken to Cooper Green Hospital where he received twenty (20) stitches. *Id.*

Based on the allegations set forth in the plaintiff's objections, the court finds that the plaintiff has sufficiently stated a Fourteenth Amendment excessive force claim against defendant Newfield for 28 U.S.C. § 1915A purposes. Thus, the magistrate judge's Report and Recommendation is due to be rejected to the extent it recommends dismissal of the plaintiff's excessive force claim against defendant Newfield.

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, and the objections thereto, the court is of the opinion that the magistrate judge's report is due to be and is hereby ADOPTED and the recommendation is ACCEPTED, with the exception of the plaintiff's Fourteenth Amendment excessive force claim against defendant Newfield. The recommendation to dismiss the plaintiff's excessive force claim against defendant Newfield is REJECTED.

Therefore, the plaintiff's request for reinstatement of his parole is due to be DISMISSED pursuant to 28 U.S.C. § 1915A(b)(1) and/or (2). The plaintiff's Fourteenth Amendment excessive force claim against defendant Newfield is REFERRED to the magistrate judge for further proceedings.

An appropriate order will be entered.

Done the 7th day of January, 2009.

A handwritten signature in black ink, appearing to read "U.W. Clemon", is written above a horizontal line.

U.W. Clemon
United States District Judge